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Palestine and Israel?**

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**Quo vadis international criminal justice in the crisis between
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Abstract: This paper aims to investigate not the international legal situation between Palestine and Israel but the latest events that have occurred since October 2023, as well as the role played by International Court of Justice. An impartial court that will be able in the near future to investigate what is happening now and to punish those responsible for this massacre, for the human lives lost as well as the protection of human rights and peace in the area.

Keywords: ICC; international criminal justice; Palestine; Israel; individual criminal responsibility; ius ad bellum; international law; international peace; role of the Prosecutor; crimes against humanity; jurisdiction of the ICC.

Introduction

The continuing violence in the Israeli area was a reality that had been going back and forth for many years despite the intermediation of many countries that tried to find a compromise but to no avail. A few months ago, in October 2023, some attacks by Hamas against Israel began again, this time more violent and bloody, opening another outbreak on the international stage, putting the area once again to be commented on by the mass media and every forum international, international tables of power for icons of violence and the death of innocent people (Liakopoulos, 2024).

The victims continue day after day just as the invasion of the Israeli armed forces in the strip has led to an encirclement of Gaza city and to spread the violence and conflict to neighboring countries. The military project also has a legal face both for the consolidation of the Israeli-Palestinian conflict as well as for the profiles of *jus ad bellum* and *jus in bello* connected with an attitude of continuous violence that reaches the point of conflict between civilians (Schmitt, 2023, Haque, 2023, Sassòli, 2023, Dannenbaum, 2023, Jill, 2023).

Of course, the problem of violence for every jurist has various aspects not only in the use of force, protection of human rights, aggression, endless war but also in the basis of the assumptions of crimes that are punished by the International Criminal Court

(ICC).

Another parallel area that goes forward to these crimes is that of the international responsibility of individuals for international crimes and especially as the conflict continues. Events change, the difficulties of creating a picture of the whole situation and above all not of identifying but of having the evidence, witnesses to speak and to punish those responsible is always a difficult reality to capture especially for events that are continuous.

And all this in order to build a legal reconstruction that is not easy to ascertain all the relevant facts to arrive at the ICC without first avoiding the path of fact-finding functions research from the Prosecutor and from any other body that can prove crimes to arrive at a case before the ICC (Liakopoulos, 2019b).

ICC jurisdiction in the Israeli-Palestinian conflict

After the planned Israeli military operations on Gaza in 2008, entitled Cast Lead, and the international consequences that the entire international community knows about, after about a year the Palestinian authorities tried to find a basis for cooperation with the ICC and bring the attention of the international community to the commission of international crimes.

With a related declaration sent to the ICC (Liakopoulos, 2022a) it was allowed to highlight and verify, control the jurisdiction of

the ICC as an international mechanism that can find a way of punishment for crimes committed in the area according to art. 12 (3) of the Statute of the ICC (StICC) (Ambos, 2022b).

The related mechanism allowed the state, first of all, to accept an obligation of cooperation and not “a general complaint” of a country to the ICC, but without being able to do anything and above all not to follow Chapter 9 of the StICC (Ambos, 2022b).

The conclusion of the presented statement from the Prosecutor¹ allowed to go further in the situation due to the problem of statehood without taking into account some measures (Akande, 2012; Zimmermann, 2013; Jill, 2023) of continuous development of the work that was necessary to carry out. The political situation between states and the continuous support from the United Nations independently ensured a decision that was a sensitive, perhaps discretionary way of acting, to begin research in the area.

A middle ground solution was chosen through the possibility of Palestine becoming a “member observer state” in the UN General Assembly. A road that was mentioned in the history of the Palestinian-Israeli conflict through Resolution n. 67/19 of 29 November 2012 (Vidmar, 2012; Zimmermann, 2013; Liakopoulos, 2020c; Imseis, 2021).

¹<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>

Of course, talking about the state of Palestine was “a hidden and hopeful reality” for everyone and especially for those living in the area but not a certainty given the many problems and above all those of international trade, the ratification of international treaties and the final accession as equal status with all other members of international organizations and members of the UN (Vidmar, 2012; Vidmar, 2013).

A difficult topic to approach through statehood was also that in the field of human rights and international protection according to humanitarian law. These are points not only for discussion but also less for evaluation for the circle of the ICC and its own membership as has happened in practice by the Palestinian national authorities with the UN Secretary General who accepted its entry into force for Palestine from 1st April 2015.

This was an “obligatory reality” given the continuous atrocities that have been carried out since 2014, the terrorist acts and the continuous rocket launches against Israel. It occurred through a new declaration of acceptance² by the Palestinian authorities at the ICC regarding the jurisdiction of the ICC to retroactively apply the relevant competence of the jurisdiction of the ICC to events that occurred during the conflict of the 2014. The ultimate goal for the Palestinian authorities was always acceptance but also punishment for crimes sentenced by the ICC

²https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/Palestine_A_12-3.pdf

itself.

A frontline review, as a commitment action on the part of the ICC, was the beginning of the work initiated by the Prosecutor for the situation in Palestine³. This is an exam that everyone was waiting for and which had been going on for years in a discreet and long-awaited manner. By formalizing the formal investigation and the activities carried out in the last years of Prosecutor⁴ (he followed *motu proprio* activities which ended in 2018) we arrive at a first conclusion of the preliminary examination. It is only happened in December of 2019⁵.

Without wasting time, the pre-trial chamber was asked for “legal support” for the jurisdiction of the ICC due to the situation in Palestine based on art. 19 (3) StICC (Ambos, 2022b). The questions asked were the following:

“(…) - whether Palestine should be considered a state for the limited purposes of accession to the statute and consequently whether the Court is empowered to fully exercise its jurisdiction in this regard, and whether the Palestine is entitled to exercise the powers conferred by the Charter on a state; -in the event of a positive answer to the first question, what is the exact territorial scope over which the Court can exercise its jurisdiction for the crimes provided for by the Statute or, put differently, what is the territory of the state of Palestine for the limited purposes of application of the Rome Statute (...)”. The *Friends Curiae* procedure from numerous states⁶ concluded

³<https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-situation>

⁴<https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>

⁵<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>

⁶<https://legal-tools.org/doc/u9y4lh/pdf/>; <https://legal-tools.org/doc/p5ixh2/pdf/>; <https://legal-tools.org/doc/l2ayii/pdf/>;

with an important and positive majority which reached a decision on 5 February 2021⁷.

In fact, despite the dissenting opinions of the judge Kovàca and the separate opinion of Perrin de Brichambaut, it was decided that the accession process to the Statute was carried out regularly and as established by the Statute of the ICC. Palestine's statehood has been interpreted narrowly, as an ad hoc one and as a participant in the family of the ICC.

The legal consequences that such recognition and the punitive effects that such an attitude could have were actually the way to open up other legal consequences for the near future. The jurisdiction of the court and the acceptance of Palestine did not automatically mean recognition as a state, but in a broad sense a particular statehood which enjoys certain rights given the necessity of the situation.

The political confrontation of the international community which has always been divided into two parts for this type of statehood based with a simple step on the unanimous international practice that was part of the declarations of the UN since 1967 (Gaza, the West Bank and East Jerusalem) regarding

<https://legal-tools.org/doc/rtx1y5/pdf/>

⁷https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF;

https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF;

https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01166.PDF

borders. Only this time such acceptance on the part of the ICC opened the way for punishment of crimes committed in the area (Ambos, 2021) despite the fact that there were certainly many opinions and reactions from the state as well as from government organizations however not of the US position⁸, especially after the sanctions against the ICC and its officials. Positive attitudes for the Palestinian authorities but also hostile ones (for the role of the prosecutor who continued with a relative opening of the investigation) are expressed⁹.

The positive attitude has to do with the acceptance of Palestine, as a member (according to the ICC statute) to the ICC, and the negative one with the starting of investigations in the area, following the procedure of ex art. 19 (3) and the adoption from the ICC of the relative jurisdiction (Talmon, 2021)¹⁰.

Perhaps the role of the Prosecutor was considered useless because in reality the Palestinian referral started on 13 June 2014 was part of the conduct, atrocities and crimes that the prosecutor could investigate in the Gaza area, the West Bank and East Jerusalem. Only a constituent element was needed to

⁸<https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/#:~:text=Today%2C%20the%20Prosecutor%20of%20the,no%20jurisdiction%20over%20this%20matter.>

⁹<https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>

¹⁰<https://www.canada.ca/en/global-affairs/news/2021/02/statement-by-minister-of-foreign-affairs-on-international-criminal-courts-decision-regarding-its-jurisdiction-over-west-bank-and-gaza.html>

specify the conduct on the territory of the state to produce the relevant effects in a perfect way (Liakopoulos, 2020b), which can be followed in the state carrying out the investigation as well as in third countries as we have seen in the situation between Bangladesh/Myanmar for crimes against Rohingya, called as cross-border crimes¹¹. Individual responsibility in the territory of Israel was a reality of exercising one's jurisdiction based on the active personality as foreseen by art. 12 (2) (b) StICC (Ambos, 2022b).

The silence of recent years regarding the situation in the area allows us to arrive at the hypotheses that perhaps the investigations continue with difficulty and/or after the British intervention of Prosecutor Karim Khan they are abandoned for various reasons that everyone is free to imagine¹².

However, after the events that began at the end of 2023, the commitment of the ICC should not have been stopped and/or abandoned, given that the outbreak in Ukraine led ex novo to a new access of investigations, after a referral¹³, which included the majority of more than forty states, for the arrest of Putin.

The Prosecutor released some official statements from scratch,

¹¹https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF

¹²<https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-Situation-Completion-Policy-eng.pdf>;
<https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>

¹³<https://www.icc-cpi.int/sites/default/files/2023-08/2023-strategic-plan-otp-v.3.pdf>

reassuring that the situation in Palestine was also a priority for the Prosecutor's Office of the ICC given the events and that the criminal investigations will lead to criminal action against those responsible due to the conduct that continues to be violent and inhumane against the Palestinian people¹⁴.

The news coming from the Palestinian-Israel area are always difficult to resolve and day after day they become even more complex towards a continuous competition of criminal norms due to the urgency of finding legal solutions and responding on a typical level (Olusanya, 2014), to the causes of justification and to criminal responsibility (Ambos, 2013). A certain legal aestheticism, towards a conferring of a dogmatic, legitimacy to a safe body of legislation, precise to the ICC, is a topic under discussion and of concern (Szoke Burke, 2012).

The lack of general principles, such as that of consumption, a specialty suitable for providing an interpretation of cooperation, coordination to a degree of organicity in the competition of fundamental themes of the cumulative charges with regards to the attribution, the cumulative convictions (Maculan, Liñan Lafuente, 2016) and the punishment towards a decisive phase (sentencing phase) (Van Sliedregt, Vasiliev, 2014) is the circle of building an effective punishment system at the ICC as a basis for resolving future crises as well as making those who they

¹⁴<https://www.bbc.co.uk/sounds/play/p0glc9h9>

only think about non-punishment at an international and not level.

The structural analysis of the cases gives the path to the concurrence of norms as we also see in the case we are investigating (Darcy, 2014).

But we must say that what is missing is a criminal policy that is perhaps more suitable for this type of dispute and the particular, complex problems that occupy the Palestinian area, reaching a degree of systematic coherence that connects the problem of the dispute with the functions of punishment (Liakopoulos, 2022b).

The war events of recent months as a subject of investigation and punishment from the ICC

The events of a warrior nature that have been going on since October 2023 adding even more pages of history in the Palestinian-Israeli conflict have a fragmentary and not exactly precise basis for the punishment of the ICC.

The information that comes from the mass media and less from organizations, state bodies, neighboring states in the area only provides the basis for continuous investigative research by the prosecutor in the area and for the related criminal actions in this regard. Armed conflict is a reality, but this alone does not say many things for the ICC.

The attitude between Hamas and the Israelis involves from a

legal point of view an evolving basis of war crimes, an evaluation, qualification of international and not nature. Certainly several bodies of the UN reported Israeli jurisprudence from the Israeli Supreme Court¹⁵ allowing us to take positions about the escalation of the conflict, the use of force and the aggression pursuant to the theory of general international law (Schmitt, 2023)

The military-type attitudes of the faction-type military groups that are presented in Gaza are organized as military factions allowing us to speak for the serious violations of humanitarian law, of the Geneva conventions, of individual criminal responsibility as crimes of war according to the StICC. These are conducts that are also part of art. 8 (2) (a)(i) of the StICC and of art. 8(2)(a)(viii) StICC (Ambos, 2022b).

At this point we must clarify the difference between civil and common law (Jeutner, 2017) noted in the Bemba Gombo case of the ICC where the judges considered the cumulative indictment for crimes of rape and torture as illegitimate, as crimes qualified against humanity (Liakopoulos, 2018a) in front of facts that are involved in a specialty relationship. But how many suspects can we have from the area we are examining now? We must move towards cumulative charging whenever the offenses include

¹⁵<https://ihl-databases.icrc.org/en/national-practice/public-committee-against-torture-israel-et-al-v-government-israel-et-al-supreme>

elements that are distinct from each other¹⁶.

The case we are examining allows us to arrive at the conclusion of an organized and hierarchical apparatus of power (Chazal, 2013; Chazal, 2015), which comes from the hierarchical relations between superiors and inferiors for the execution of directives of a leadership not clear for the international community many times but implemented under the authority of a leader whose execution mechanism is equivalent to the execution of specific orders with quite a lot of zeal.

This creates a problem regarding the authoritarian will of the leader who functions as an independent individual, as an “anonymous, interchangeable figure” (Eser, 2011).

The form of responsibility within a joint action prevents the execution of a crime that replaces as an indirect perpetrator the criminal activity within supporting units of action.

The high numbers of deaths in the Israeli territory make us talk about a high level of civil protection during an armed conflict. On the other side, the people who had various other citizenships than the Israeli one¹⁷ were guided by force in places under the control of Hamas and were held as hostages¹⁸.

¹⁶ICC, Prosecutor v. Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, PTC-II, ICC-01/05-01/08, 15 June 2009, par. 202-205. “(...) as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges (...)”.

¹⁷<https://www.reuters.com/world/middle-east/more-than-half-hamas-hostages-have-foreign-nationality-israel-2023-10-25/>

¹⁸<https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

People with serious injuries and traumas are victims of the commission of war crimes which according to art. 8 (2)(a) (iii)StICC are caused voluntarily, producing serious suffering and related damage to physical integrity and health. The hostage of these people is not only a violation that allows punishment for war crimes, torture or inhuman treatment according to art. 8(2) (a)(ii)StICC but also shows a deprivation for the right to a fair and regular trial (art. 8(2)(a)(ii) StICC (Ambos, 2022b).

The victims have suffered violations of their personal dignity as well as de facto situations of rape and other serious forms of sexual violence under Article 8(2)(b)(xxii)StICC. The armed attacks on Israeli territory are carried out through the relative launch of bombs and all the characteristics that are found to be suitable, thus distinguishing military objectives from civilian ones according to the opinions of the commission of various war crimes which are sanctioned by the StICC itself (Liakopoulos, 2019a).

These attacks against the civilian population, against civilians directly participating in hostilities (art. 8(29(b)(i)StICC), the launching of attacks against civilian property (art. 8(29(b)) (ii)StICC), the launch of attacks, show the relative safety that are aware of the loss of life, damage to civilians, civilian assets that are clearly disproportionate to a military advantage and certainly expected (art. 8(2)8(b)(iv)StICC (Ambos, 2022b).

Within this framework of anti-war crimes, the cases that are taken into consideration and in relation to the attitude of Hamas, respect the armed attacks by Israel on the Gaza Strip and the possible use of human shields which are criminalized according to art. 8(2)(b9(xxiii) StICC, i.e. a crime provided for by the Statute for armed conflicts that have an international nature, i.e. are the basis of suspicions for an escalation of a war to any type of conflict.

The cases that are foreseen in the StICC do not include all the cases that are anticipated by the rules of public international law. This is a macro-category according to Goldstone and Simpson (Goldstone, Simpson, 2003)¹⁹, of crimes that are part of the use of terror in customary law as for example we saw in the Galić case of the ICTY²⁰. Additionally, the Elements of Crimes and the Rules of Procedure and Evidence according to art. 21(1)(a)) talk about a second phase, i.e. a list of other treaty instruments of customary law (Cryer, 2009; Van den Herik, 2016; D'Aspremont, 2020).

On the other hand, the Prosecutor through the related statements he made about the situation of Boko Haram in Nigeria (Cohen, 2020) allow us to understand that some actions of continuous and massive violence are typical cases of war crimes against

¹⁹<https://digitallibrary.un.org/record/261584?ln=EN>

²⁰ICTY, Prosecutor v. Stanislav Galić, IT-98-29-A of 30 November 2006, par. 86-90: <https://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>

humanity. The elements offered by art. 7 (1)StICC are based on the situation we are experiencing in recent months between Hamas and Israel.

The cases of war crimes conduct integrate constitutive elements, crimes against humanity according to art. 7(1)(a), (b), (e), (f), (g), (k) relating to murder, imprisonment and other serious deprivation of liberty, torture, rape and forms of sexual violence, other inhuman acts (Ambos, 2022b).

The massive violence of human rights through military attitudes by Israel, as a retaliatory reaction and not only against the attacks suffered, allow us to identify the conditions for the application of state cases, of war crimes in consideration of attacks, bombings on Gaza, principles of necessity, distinction, precaution, proportionality, elements that construct individual criminal responsibility. The StICC does not contain a single type of attacks of an indiscriminate nature but specific types of attacks which are not permitted but which correspond in scope to various constituent elements which are part of the rules of international humanitarian law.

International bodies have documented episodes and not only relevant to the case which is part of art. 8(2)(b)(i), (ii), (iii), (iv) attacks of an intentional nature against civilians as well as attacks against personnel, material, units or vehicles involved in humanitarian assistance (Ambos, 2022b).

The same article includes the attacks on places that are sensitive to worship, the arts, education, science, historical monuments, hospitals, places that collect the wounded, the sick. As UNRWA²¹ reported and according to the OCHA²² updates on humanitarian issues, they allow us to talk about sources of information that seek to document places of worship, shelters from serious damage, victims of other places, structures of humanitarian function and relief assets such as refugee camps (Schack, 2023; Manea, 2023). Wounded and victims including journalists reported the commission of war crimes to the office of prosecutor.

This type of criminal nature of prohibited attacks requires the integration of a subjective nature which is demanding towards the intention, the consideration of the circumstances for an attack which allows us to connect and think art. 30StICC, i.e. to the related topic of mens rea (Moerner, Shapiro, 2023).

We thus exclude the figure of mere malice (Werle, Jessberger, 2020; Ambos, 2022a) and recklessness which we see and take into consideration through the relevant case in articles 8 (2)(a)(i) and (ii) StICC of the war crimes of an indiscriminate attack and the related intention of an attack with an exclusive means of targeting civilians which corresponds to a voluntary act which

²¹<https://www.unrwa.org/resources/reports/unrwa-situation-report-25-situation-gaza-strip-and-west-bank-including-east-Jerusalem>

²²<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-32>

has as its objective to target civilians military objectives, simultaneously to civilian population against hostilities and the vicinity. This intention as a factor of international method was noted by the ICC in the Katanga case²³ and in the related ruling²⁴.

In this case the mens rea is represented as a crime of attack which has an indiscriminate nature and intention against civilians and civilian property. Attack that hits military targets and the civilian population itself (Ambos, 2022a). Thus we cannot confuse time with the evaluation of the legality of an attack according to international humanitarian law but as profiles of distinction of proportionality towards an attack that is considered lawful, proportionate and visible to this position according to international law.

A total attack on the Gaza Strip also means lack of food, water, suspension of electricity, fuel, blockade of humanitarian aid except the Rafah crossing towards Egypt. The borders of Gaza are controlled by Israeli forces constituting arguments of criminal activities that are foreseen by the same StICC. Every missile against the civilian population in the north of the Strip as

23ICC, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chu, No.: ICC-01/04-01/07, 30 September 2008, parr. 273-274, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF

24ICC, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Germain Katanga, No.: ICC-01/04-01/07 Date: 7 March 2014, par. 807: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF

a consequent effect of every type of bomb attack shows that the land invasion considers such cases that also in this case they become part of art. 8 (2)(b)(viii)StICC (Khan, 2023); in addition as topics that are part of violation of human rights, humanitarian law, deprivation of property, of civilians thus limiting the free access and use of humanitarian aid. As a consequence, the lack of food and water also shows a case that causes the death of civilians and is punished according to art. 8(2)(b)(xxv) StICC (Ambos, 2022b).

Conducts that verify contextual elements that evaluate crimes against humanity according to art. 7(1), a), b), d), f), h), k), i.e. murder, extermination, deportation and forced transfer of population, torture, persecution, other inhuman acts (Ambos, 2022b).

The situation in Gaza, except for the humanitarian crisis, can also be considered a crime of genocide according to art. III(c) of the Convention of the UN on the prevention and repression of genocide and repeated in art. 25 (3)(e)StICC (Liakopoulos, 2018b) as a risk verifying genocide in UN human rights. Determining a strategy to arrive at a criminal action of the prosecutor even of a precautionary nature of the situation in the area should take into consideration and prove the subjective requirement of art. 6StICC, the intention to destroy all or part of a protected group. But isn't everyone's human life protected?

The conduct that we have noticed so far allows us to say that the cases that are part of art. 6 StICC: “killing members of the group, causing acute physical suffering or psychological harm to members of the group, intentionally inflicting living conditions calculated to cause the physical destruction of all or part of the group”, they are cases that are part of the rules of erga omnes according to the Convention on the prevention and repression of genocide of 1948, establishing state and international responsibility before the International Court of Justice (ICJ) as we have seen in the *Gambia v. Myanmar* case (Liakopoulos, 2020c) regarding the situation of the Rohingya and in Ukraine (Hill, 2023).

Palestine and Israel are also part of the Convention and have formulated the relevant reservations and declarations according to art. IX by attributing the litigation jurisdiction before the ICJ and accepting the jurisdiction through the relevant declaration of ex art. 35 (2) of the statute of the ICJ²⁵, as we saw in the history of the Court during 2018 which had served to establish the related dispute against the US due to the move of the American Embassy to Jerusalem to continue the establishment of a dispute²⁶.

The conduct towards the Palestinians in Gaza and in the

²⁵<https://www.icj-cij.org/states-not-parties>

²⁶<https://www.icj-cij.org/sites/default/files/case-related/176/176-20180928-APP-01-00-EN.pdf>

Palestinian territory as well as the episodes of violence in the West Jordan and the cases of collective punishment with a punitive nature towards all members of the community in the face of criminal acts lead to talk of individual responsibility and not only.

This is a punishment that is also based on the precise intention of destroying the Palestinian community by any means, identifying that those responsible for the attacks that began in October 2023 bear individual criminal responsibility.

Conducts against criminal cases, against principles of international law and international humanitarian law constituting war crimes according to the Statutes of international tribunals, its jurisprudence relating to customary law according to art. 4 of the Statute of the International Criminal Tribunal for Rwanda; art. 3 of the special court for Sierra Leone (Liakopoulos, 2018b); art. 3 of the Statute of the Special Court for Sierra Leone and the related decision of the Appeals Chamber²⁷.

Collective punishment was also made part of the StICC by sharing the relevant conduct that is part of the collective punishments pursued by the ICC and the cases for crimes against war and against humanity (Heller, 2023; Liakopoulos, 2023).

From the above we can understand that we are led to an

²⁷Prosecutor v. Moinina Fofana and Allieu Kondewa, case n. SCSL-04-14-A of 28 May 2008, par. 223ss.

exclusion of responsibility that acts with the core of the international pastoral phenomenon as a social phenomenon in an international community that often suffers from a universal perception of injustice (Croquet, 2015), as an ideal of a universal justice for every victim presupposing a fair treatment. The defense of an international criminal responsibility may thus weaken the continuity and evolution of international criminal law.

Many times the principles (Kalshoven, Fontein, 2013)²⁸ are correct and documented but then they are rejected perhaps because of a prejudice against the defendants for the gravity that international crimes bring for the selection of defendants by the Prosecutor to be tried as responsible for international crimes which many times exclude their responsibility.

Concluding remarks

The conduct in which the prosecutor investigated and judged extends to potential crimes committed in the Palestinian territory starting from 2014. It is certain that the conduct enters the jurisdiction of the ICC and in the conduct proceedings of the subjects who are involved as well as of other third states.

Palestine is different from the state of Israel. Palestine is only part of the StICC and has accepted cooperation obligations

²⁸See from the ICTY the case: Kordic and Cerkez, Prosecutor v. Dario Kordic, Mario Cerkez, Judgment, IT-95-14/2-T, Trial Chamber, 26 February 2001, par. 449.

(Liakopoulos, 2019c). Palestine is a StICC which has accepted obligations of cooperation with the ICC which are part of Chapter 9 StICC.

In practice, this means the opening of cooperation and collaboration with the office of the prosecutor when criminal proceedings are opened against Israeli citizens, Hamas groups, Palestinian authorities or other groups requiring other investigative and collection of evidence, implementing measures up to and including arrest warrants during the course of proceedings.

The political fracture of this type of cooperation with the ICC and access to the territory is controlled by the state of Israel as well as international organizations that will be used as witnesses in a probable criminal prosecution. Individual responsibility is the result of national investigations and trials against oneself (Liakopoulos, 2020a). None of this applies to the state of Israel since the StICC is obliged to cooperate with the ICC (Liakopoulos, 2019c).

Cooperation which has many problems given the situation we have seen in Ukraine opens the possibility to commit alleged crimes that are committed by Israeli citizens excluding that future American administrations support the activity of the ICC and demonstrate the support of the prosecutor to the extent possible as we have seen in other situations.

Cooperation is necessary due to delegitimization and double standards, i.e. the limits and practicality for investigating events not so much in the present situation but also for any other hypothesis. The factor of communication is also important as a strategy that changes suspicions to concrete accusations and evidence to be examined by the Prosecutor as well as by the entire international community as a whole. In particular, the statements made by the Prosecutor in Cairo²⁹, during his visit to Egypt are demonstration points for examining the effects on the behavior and conduct of the actors involved.

The situation in Palestine and Israel is a decisive turning point for their future in the project of credible international criminal justice. The suffering of the victims regardless of the facts and the criminal responsibility of individuals are objectives of every legal civilization, hope for a profound climate of the basic precepts of the international law during and after conflicts on the international stage by placing limits and openings to international criminal justice, trying not to find a solution to every dispute but at least the jurisprudence and every international court to judge the conduct of the actors in an effective and fair way proving the legal and moral responsibility that does not go outside the international reality, from the

²⁹<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel#:~:text=International%20Criminal%20Court%20Prosecutor%20Karim,State%20of%20Palestine%20and%20Israel>.

principles that international law has highlighted since many years ago trying to protect human lives in an exemplary way (Jenks, Acquaviva, 2014).

Cooperation, international responsibility, the achievement of peace based on liberal ties between states and the faithful application of international criminal law in a genuine international legal protection, first of all, of the right and then of political governance, would be an important step for the future of peoples such as the case of the continued inability to find a peaceful solution between Palestine and Israel.

References

- Akande, D. (2012, April, 5). ICC Prosecutor decides that he can't decide on the statehood of Palestine. Is he right?: *EJIL:Talk!*: <https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>
- Ambos, K. (2013). Castigo sin soberano? La cuestión del ius puniendi en derecho penal internacional. Una primera contribución para una teoría del derecho penal internacional consistente. *Revista Persona y Derecho*, 68, 7ss.
- Ambos, K. (2021, March, 21). Solid jurisdictional basis"? The ICC's fragile jurisdiction for crimes allegedly committed in Palestine. *EJIL:Talk!*: <https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/>
- Ambos, K. (2022a). *Treatise on international criminal law: Volume II: The crimes and sentencing*. Oxford University Press, Oxford, 177ss.
- Ambos, K. (2022b). *Rome Statute of the International Criminal Court: Article-by-article commentary*. C.H. Beck, Munchen, 406ss.
- Chazal, N. (2013). Beyond borders? The International Criminal Court and the geopolitics of international criminal justice. *Griffiths Law Review*, 14 (3), 715ss.
- Chazal, N. (2015). *The International Criminal Court and global*

social control: International Criminal Justice in late modernity.
ed. Routledge, London, New York.

Cohen, A. (2020). Prosecuting terrorists at the International Criminal Court. Reevaluating an unused legal tool to combat terrorism. *Michigan State International Law Review*, 20 (2), 229ss.

Croquet, N.A.J. (2015). *The role and extent of a proportionality. An analysis in the judicial assessment of human rights limitations within international criminal proceedings.* ed. Bruylant, Bruxelles.

Cryer, R. (2009). Royalism and the King: Article 21 of the Rome Statute and the politics of sources. *New Criminal Law Review: An International and Interdisciplinary Journal*, 12 (3), 392ss.

D'Aspremont, J. (2020). The two cultures of international criminal law. In K. Heller and others (eds). *The Oxford handbook of international criminal law*, Oxford Handbooks, Oxford, 416-421.

Dannenbaum, T. (2023, October 11). The siege of Gaza and the starvation war crime. *Just Security*: [The Siege of Gaza and the Starvation War Crime \(justsecurity.org\)](https://www.justsecurity.org/2023/10/11/the-siege-of-gaza-and-the-starvation-war-crime/)

Darcy, S. (2014). *Judges, law and war: The judicial development of international humanitarian law.* Cambridge University Press, Cambridge.

- Dugard, J. (2013). Palestine and the International Criminal Court: Institutional failure or bias?. *Journal of International Criminal Justice*, 11 (3), 564ss.
- Eser, A. (2011). Procedural structure and features of International Criminal Justice: Lessons from the ICTY. In B. Swart, A. Zahar, G. Sluitter (eds). *The legacy of the International Criminal Tribunal for the Former Yugoslavia*. Oxford University Press, Oxford.
- Goldstone, R.J., Simpson, J. (2003). Evaluating the role of the International Criminal Court as a legal response to terrorism. *Harvard Human Rights Journal*, 16, 16ss.
- Goodman, R., Meier, M.W., Bridgeman, T. (2023, October, 17). Expert guidance: Law of armed conflict in the Israel-Hamas war. *Just Security*: [Expert Guidance: Law of Armed Conflict in the Israel-Hamas War \(justsecurity.org\)](https://www.justsecurity.org/2023/10/17/expert-guidance-law-of-armed-conflict-in-the-israel-hamas-war/)
- Haque, A. (2023, November, 6). Enough: Self defence and proportionality in the Israel-Hamas conflict. *Just Security*: [Enough: Self-Defense and Proportionality in the Israel-Hamas Conflict \(justsecurity.org\)](https://www.justsecurity.org/2023/11/06/enough-self-defense-and-proportionality-in-the-israel-hamas-conflict/)
- Heller, K.J. (2023, October, 24). A short history of the war crime of collective punishment. *Opinio Juris*: <https://opiniojuris.org/2023/10/24/a-short-history-of-the-war-crime-of-collective-punishment/>
- Hill, S. (2023). Ukraine crisis: Types of interventions,

punishment of crimes and international law. *American Yearbook of International Law*, 1(1), 667-693.

Imseis A. (2021). On membership of the United Nations and the State of Palestine: A critical account. *Leiden Journal of International Law*. 34(4), 856ss.

Jenks, C. Acquaviva, G. (2014). Debate: The role of international criminal justice in fostering compliance with international humanitarian law. *International Review of the Red Cross*, 96 (895/896), 777ss.

Jeutner, V. (2017). *Irresolvable norm conflicts in international law. The concept of a legal dilemma*. Oxford University Press, Oxford.

Jill, D. (2023, October, 13). Our shared horror. *EJIL:Talk!*: [Our Shared Horror – EJIL: Talk! \(ejiltalk.org\)](https://ejiltalk.org/our-shared-horror/)

Kalshoven, F., Fontein, T. (2013). Some reflections on self-defence as an element in rules of engagement. In M. Matthee, B. Toebes, M. Brus (eds.). *Armed conflict and international law: In search of the human face. Liber Amicorum in memory of Avril McDonald*. T.M.C. Asser Press, The Hague, 97ss.

Khan, Y.S. (2023, October, 19). The directive to evacuate Northern Gaza: Advance warning or forced displacement. *Just Security*: <https://www.justsecurity.org/89617/the-directive-to-evacuate-northern-gaza-advance-warning-or-forced-displacement/>

Liakopoulos, D. (2018a). Male rape and sexual crimes in international criminal law jurisprudence: A critical appraisal. *Revista de Estudios Juridicos-Segunda Época*, n. 18.

Liakopoulos, D. (2018b). Difficulties paths of international criminal justice: Exercise of criminal jurisdiction against the constitutional bodies in office charged with international crimes in Special Tribunal for Sierra Leone. *Revista NOMOS*, 38 (2), 4ss.

Liakopoulos, D. (2019a). Rough justice: Anatomy and interpretation in the exclusion of individual criminal liability in international criminal justice. *Revista do Curso de Direito do UNIFOR*, 10(1), 148-233.

Liakopoulos, D. (2019b). *The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence*. ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2019c). International cooperation, legal assistance and the case of lacking states collaboration within the International Criminal Court, *Revista CES Derecho*, 10 (1), 374-417.

Liakopoulos, D. (2020a). Interpretative trends and standards of proof of fact for the attribution to the state of individual conduct in the recent jurisprudence of international courts. *1991. Revista de Estudios Internacionales*, 2 (1), 74-96.

Liakopoulos, D., (2020b). Crisis of the nomological model, expectation of diligence and criminally relevant conduct. Comparative aspects on the definition of punishable fault. *Revista Digital de la Maestria en Ciencias Penales*, 12, 1-36.

Liakopoulos, D. (2020c). Security Council powers in relation to the crime of aggression. International security and the role of ICC, *Public Security and Public Role*, 24, 127-162.

Liakopoulos, D. (2022a). The Palestinian question and the ICC. *Research Journal Public Security and Public Order*, 30, 61-76.

Liakopoulos, D. (2024). Jus ad bellum rules, non-state actors and use of force between Palestine and Israel. *Ius Inter Gentes-Revista de Derecho y Relaciones Internacionales*, 5, 39-59.

Maculan, E., Liñán Lafuente, A. (2016). Relaciones concursales. In A. Gil Gil, E. Maculan (eds.). *Derecho penal internacional*. Dykinson, Madrid, 303-322.

Manea A. (2023, November, 4). Too early to tell? The “unlawfulness” of Israeli attacks: The case of the Jabalia refugee camp. *EJIL: Talk!*: <https://www.ejiltalk.org/too-early-to-tell-the-unlawfulness-of-israeli-attacks-the-case-of-the-jabalia-refugee-camp/>

Moerner, A., Shapiro, J. (2023). Consolidating the spectrum of mens rea in the jurisprudence of international criminal law. *Yearbook of International & European Criminal and*

Procedural Law, 2, 79-217.

Olusanya, O. (2014). *Emotions, decision-making and mass atrocities. Through the lens of the macro-micro integrated theoretical model*. Ashgate Publishing, London.

Sassòli, M. (2023, October, 30). Israel-Hamas 2023 symposium. Assessing the conduct of hostilities in Gaza. Difficulties and possible solutions. *Lieber Institute West Point*: [Israel – Hamas 2023 Symposium – Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions - Lieber Institute West Point](#)

Schack, M. (2023, November, 8). In defence of preliminary assessments: Proportionality and the 31 October attack on the Jabalia Refugee Camp. *EJIL:Talk!*: <https://www.ejiltalk.org/in-defence-of-preliminary-assessments-proportionality-and-the-31-october-attack-on-the-jabalia-refugee-camp/>

Schmitt, M.N. (2023, October, 10). Israel-Hamas 2023 symposium. The legal context of operation Al-Aqsa flood and swords of iron. *Lieber Institute West Point*: [Israel – Hamas 2023 Symposium - The Legal Context of Operations Al-Aqsa Flood and Swords of Iron - Lieber Institute West Point](#)

Szoke-Burke, S. (2012). Avoiding belittlement of human suffering. A retributivist critique of ICTR sentencing practice. *Journal of International Criminal Justice*, 10, 563ss.

Talmon, S. (2021, February, 11). Germany publicly objects to

the International Criminal Court's ruling on jurisdiction in Palestine. *GPIL: German Practice in International Law: Germany publicly objects to the International Criminal Court's ruling on jurisdiction in Palestine - GPIL - German Practice in International Law* (uni-bonn.de)

Van Den Herik L. (2016). The decline of customary international law as a source of international criminal law. In C.A. Bradley. *Custom's future: International law in a changing world*. Cambridge University Press, Cambridge, 232ss.

Van Sliedregt, E., Vasiliev, S. (eds). (2014). *Pluralism in international criminal law*. Oxford University Press, Oxford.

Vidmar, J. (2012, December, 4). Does General Assembly Resolution 67/19 have any implication for the legal status of Palestine?. *EJIL:Talk!*: <https://www.ejiltalk.org/does-general-assembly-resolution-6719-have-any-implications-for-the-legal-status-of-palestine/#:~:text=While%20the%20General%20Assembly%20resolution,recognise%20Palestine%20as%20a%20state.>

Vidmar, J. (2012). Explaining the legal effects of recognition. *The International and Comparative Law Quarterly*, 61 (2), 362ss.

Vidmar, J. (2013). Palestine and the conceptual problem of implicit Statehood. *Chinese Journal of International Law*, 12 (1), 22ss.

Werle, G., Jessberger, F. (2020). *Principles of international criminal law*. Oxford University Press, Oxford, 115ss.

Williams, S., Woolaver, H. (2020). The role of State *amici curiae* in the article 19(3) ICC statute proceedings: Friends or distraction?. *Journal of International Criminal Justice*, 18 (4), 892ss.

Zimmermann, A. (2013). Palestine and the International Criminal Court *quo vadis?*: Reach and limits of declarations under article 12(3). *Journal of International Criminal Justice*, 11 (2), 304ss.